Determination by the Welsh Ministers under section 195 of the Social Services and Well-being (Wales) Act 2014

1. This is a determination of a dispute between LA1 and LA2 in respect of the ordinary residence of X.

Documents

2. The agreed factual background is set out within a statement signed by the parties, and which includes an agreed chronology.

3. The parties also rely on letters exchanged between them and on an integrated assessment relating to X completed upon referral on 28 August 2024 ("the Integrated Assessment").

4. Each party has made written submissions, and these are accompanied by copies of legislation, case law and an earlier determination of the Welsh Ministers (dated 9 February 2021) to which those submissions refer.

The facts

5. X was born in June 1926. The parties agree that "*X appears to have the requisite capacity to decide where to live*", and the Integrated Assessment notes, in relation to X, that there are "*no concerns around her capacity*".

6. Until her admission to hospital on 21 December 2022, X lived in her own property in Y in the county of LA2.The property is currently on the market for sale.

7. On 21 December 2022, X's son raised concerns with LA2 that his mother was not managing at home. X was admitted to hospital on the same day because of a fall.

8. On 9 January 2023 a referral was made from the hospital to the Better at Home Service for one call daily to X.

9. On 26 January 2023, X was discharged from hospital to Z residential home ("the Care Home") located in LA1. This placement was initially self-funded, and the authorities agree that the placement was arranged by X and her family.

10. LA2 stated by email dated 30 September 2024 that, after receipt of the hospital referral to the Better at Home Service dated 9 January 2023, it has no further records relating to X. It has further confirmed that it had not undertaken an assessment of needs for care and support prior to X moving to the Care Home.

11. LA2 historical engagement with X involved a telecare assessment undertaken by the sensory team in 2018 and a home visit upon receipt of a sensory referral from Specsavers in 2021. In both instances, the cases were closed by LA2 when no further intervention was required.

12. On 28 August 2024, LA1 received a referral in relation to X as she was reportedly nearing the eligibility threshold for financial support to meet her care and support needs. The Integrated Assessment arranged by LA1 upon referral concluded that X "*requires 24-hour care in a residential setting*".

13. On 9 September 2024, LA1 corresponded with LA2 setting out that they did not believe that X was ordinarily resident in LA1 and that responsibility for meeting the needs and any future funding of care for X rests with LA2. This was disputed by LA2 in an email dated 30 September 2024.

The issue to be determined

14. The issue on which both parties have invited a determination is "*whether the 'deeming' provision of Section 194 of the Social Services and Well-being (Wales) Act 2014 applies in relation to X*".

15. If the deeming provision applies, X's ordinary residence will rest in LA2 and LA2 will have responsibility for payment of the Care Home fees when X meets the requisite threshold.

16. If the deeming provision does not apply, X will have acquired ordinary residence in the area of LA1 and funding responsibility will fall to LA1.

The law and guidance

17. Section 35 of the Social Services and Well-being (Wales) Act 2014 ("the 2014 Act") provides:

Duty to meet care and support needs of an adult

(1) A local authority must meet an adult's needs for care and support if it is satisfied that conditions 1, 2 and 3 are met (but see subsection (6)).

(2) Condition 1 is that the adult is—

(a) ordinarily resident in the local authority's area, …

(3) Condition 2 is that—

(a) the needs meet the eligibility criteria, …

(4) Condition 3 is that—

(a) there is no charge for the care and support needed to meet those needs, or

(b) there is a charge for that care and support but—

(i) the local authority is satisfied on the basis of a financial assessment that the adult's financial resources are at or below the financial limit,

(ii) the local authority is satisfied on the basis of a financial assessment that the adult's financial resources are above the financial limit but the adult nonetheless asks the authority to meet his or her needs, or

(iii) the local authority is satisfied that the adult lacks capacity to arrange for the provision of care and support and there is no person authorised to make such arrangements under the Mental Capacity Act 2005 or otherwise in a position to do so on the adult's behalf.

(5) For the meaning of "financial assessment" and "financial limit" see Part 5.

18. Section 194 of the 2014 Act contains the deeming provision which is the subject of this dispute. Section 194(1) provides:

Where an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in regulations and the adult is living in accommodation in Wales of a type so specified, the adult is to be treated for the purposes of this Act as ordinarily resident—

(a) in the area in which the adult was ordinarily resident immediately before the adult began to live in accommodation of a type specified in the regulations, …

19. The Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015 ("the Specified Accommodation Regulations") confirm that "care home accommodation" is specified accommodation for the purposes of the deeming provision.

20. The meaning of "ordinary residence" is not defined within the 2014 Act and there is no higher court decision relating to its definition under the Welsh legislation. There is, however, a significant body of case law relating to the definition of ordinary residence for a range of other purposes.

21. The leading authority is R (Shah) v London Borough of Barnet [1982] UKHL 14 which concerned use of an analogous term in the context of access to grants for further education. Lord Scarman expressed the meaning of "ordinarily resident" in the following terms:

"*Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, the term 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration*" ("the Shah test").

22. In consideration of the Shah test, Lord Slynn in Mohammed v London Borough of Hammersmith and Fulham [2001] UKHL 57 emphasised that a person's normal residence means the place where they in fact reside, and that it is not appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence (at paragraph 18). Lord Slynn said:

". . *so long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides*."

23. Deeming provisions similar to that set out within section 194 of the 2014 Act have been given judicial scrutiny. The intent of the deeming provision contained within the National Assistance Act 1948 was considered in R (Kent County Council) v Secretary of State for Health [2015] EWCA Civ 81. At paragraph 13, the court found:

The purpose of the deeming provision is to provide continuity of financial responsibility whilst a person is being provided with accommodation under section 21 of the 1948 Act. It is not uncommon for those who are eligible for such assistance, for practical reasons or reasons connected with securing their best interests, to be placed outside the area of the local authority with the statutory responsibility. The deeming provision avoids complications arising in connection with funding in those circumstances. It also avoids the possibility of a local authority placing someone outside its own area to ease its financial burdens.

24. In R (Cornwall Council) v Secretary of State for Health and another [2015] UKSC 46, the Supreme Court expressed (at paragraph 55) a similar view in the context of placements for children:

It would run counter to the policy discernible in both Acts (i.e. the Care Act 2014 and the National Assistance Act 1948) *that the ordinary residence of a person provided with accommodation should not be affected for the purposes of an authority's responsibilities by the location of that person's placement. It would also have potentially adverse consequences. For some needy children with particular disabilities the most suitable placement may be outside the boundaries of their local authority, and the people who are cared for in some specialist settings may come from all over the country. It would be highly regrettable if those who provide specialist care under the auspices of a local authority were constrained in their willingness to receive children from the area of another authority through considerations of the long term financial burden which would potentially follow.*

25. The Explanatory Notes to the 2014 Act state in respect of section 194:

> *504.Subsection (1) sets out where an adult is to be treated as ordinarily resident, if the local authority which is responsible for meeting their needs for care and support makes arrangements for the adult to live in accommodation of a particular type. As a consequence of these arrangements, the adult may move to another area. In this situation, the effect of this provision is that the adult will be treated, for the purposes of this Act, as being ordinarily resident in the area of the local authority which made the arrangements (and not in the area to which they move).*
>
> *509.The provision made by this section is based on provision which is made in section 24 of the National Assistance Act 1948 and section 105 of the Children Act 1989*

26. The Explanatory Notes to the Specified Accommodation Regulations confirm:

> *Where an adult has needs for care and support which can be met only by living in accommodation of a specified type and is living in accommodation of a specified type in Wales, the adult is to be treated (by virtue of section 194(1) of the Act) as ordinarily resident in the area in which the adult was ordinarily resident immediately before the adult began to live in the specified type of accommodation.*

27. The relevant sections of the Social Services and Well-being (Wales) Act 2014 Part 11 Code of Practice (Miscellaneous and General) ("the Code of Practice"), issued under section 145 of the 2014 Act, state as follows:

Section 194(1) deals with where an adult is to be treated as ordinarily resident, if the local authority which is responsible for meeting their needs for care and support makes arrangements for the adult to live in accommodation of a particular type. As a consequence of these arrangements, the adult may

move to another area. In this situation, the effect of this provision is that the adult will be treated, for the purposes of this 2014 Act, as being ordinarily resident in the area of the local authority which made the arrangements (and not in the area to which they move).

Ordinary residence when arranging accommodation in another area

There will be cases where the local authority considers it appropriate for a person's care and support needs to be met by the provision of accommodation in the area of another authority. If the person has needs which can only be met through certain types of accommodation, then in addition to their involvement in the planning process, the person will also have a right to make a choice about their preferred accommodation. This right allows the person to make a choice about certain types of accommodation, including where this is situated within the area of another authority. Provided that certain conditions are met, the local authority must arrange for the preferred accommodation the person has chosen. (See the Care and Support (Choice of Accommodation) (Wales) Regulations 2015 and the codes of practice relating to Parts 4 and 5 on direct payments, choice of accommodation, financial assessment and charging).

This will mean that local authorities will in some circumstances be required to arrange accommodation that is located in a different area. Moreover, there will also be other situations in which a local authority chooses to arrange accommodation for a person in another area, because that has been agreed with the person concerned. In any such case, it should be clear which local authority is responsible for meeting the person's needs in the future.

… where an adult has needs which can only be met through the provision of care home accommodation, and the accommodation is arranged is in another local authority area, then the principle of "deeming" ordinary residence applies. The adult is therefore treated as remaining ordinarily resident in the area where they were resident before the placement began. The consequence of this is that the local authority which arranges the accommodation will remain responsible for meeting the person's needs, and responsibility does not transfer to the authority in whose area the accommodation is physically located. The 'placing' authority's responsibility will continue in this way for as long as the adult's needs are met by the specified type of accommodation.
…
The ordinary residence 'deeming' principle applies most commonly where the local authority provides or arranges the accommodation directly. However, the principle also applies where a person takes a direct payment and arranges their own care and support. In such cases the individual has the choice over how their needs are met, and arranges their own care and support. If the care and support plan stipulates that the person's needs can be met only if the adult is living in care home accommodation, and the person chooses to arrange that accommodation in the area of a local authority which is not the one making the direct payment, then the same principle would apply – i.e. the local authority which is meeting the person's care and support needs by making a direct payment would retain responsibility. However, if the person chose accommodation that is outside what was specified in the care and support plan or of a type of accommodation not specified in the regulations (for example, if the person moves into a shared lives arrangement or into supported living accommodation), then the 'deeming' principle would not apply.

If it is determined that the individual's needs could best be met by staying with the new service, and the individuals chooses to remain in that setting, then the status of the individual will change from that of a care home resident to a tenant in supported living accommodation. The individual's place of ordinary residence will therefore have changed, and responsibility for meeting their care and support needs will transfer to the local authority where they are living. Where, following re-assessment, it is decided that the person's needs can still only be met by being accommodated in a care home, the placing local authority will need to arrange a different care home placement for that person. In these circumstances, the deeming provisions will continue to apply and responsibility for meeting that person's care support needs will remain with the placing authority.

28. Annex 2 to the Code of Practice, in the context of cross-border placements, contains the following:

Self-arranged placements

This guidance does not apply in relation to individuals who arrange their own care. Individuals who arrange and pay for their own care will normally become ordinarily resident in and/or the responsibility of

the area to which they move. This guidance does apply to individuals who pay for their own residential care where that care is arranged by an authority.

The parties' legal submissions

29. LA1 submits that:
    a. X remains ordinarily resident in the area of LA2 because the deeming provision applies.
    b. application of the deeming provision is not determined by the question of whether X 'had' needs for care and support at the point of discharge from hospital, or whether LA2 'arranged' X's placement at the Care Home.
    c. The interpretation provided in a determination of the Welsh Ministers dated 9 February 2021 should be applied to this determination.

30. LA2 contends that:
    a. The deeming provision does not apply because:
        i. X was able to meet her own care and support needs (with family support) without the involvement of LA2.
        ii. LA2 did not arrange the specified accommodation in the area of LA1.
        iii. it had not been determined that X had needs for care and support which could only be met if she was living in specified accommodation prior to her move to the Care Home, which was "*of her own volition*" and outside what was specified in any care and support plan.
    b. X is ordinarily resident in LA1.

The application of the law to this case

31. There is no dispute that X, from completion of the Integrated Assessment on the 4 November 2024, has care and support needs which can only be met by living in a care home. It is accepted that she was ordinarily resident in LA2 immediately before she was admitted to hospital and discharged to the Care Home in LA1 on 26 January 2023 where she continues to reside.

32. It is unclear whether X had needs which could only be met by living in a care home prior to the Integrated Assessment and specifically, upon her discharge from hospital when she took residence in the Care Home in LA1 because no assessment of needs for care and support took place at that time.

33. It is agreed that X had the requisite capacity to decide where to live and that she and her family arranged the residential placement at the Care Home upon her discharge from hospital. The residential placement did not involve LA2 engagement and was not made in accordance with any provisions of a care and support plan.

34. The critical question in X's case is whether the deeming provision applies so as to maintain her ordinary residence in the area of LA2 or contrary, whether the deeming provision does not apply, and, on an application of the Shah test, she has become ordinarily resident in the area of LA1.

35. Section 194 of the 2014 Act is set in the context of an Act which provides the statutory duties and functions of local authorities. Although section 194 does not expressly refer to the deeming provision applying where a local authority is engaged in the arrangement of specified accommodation to meet the care and support needs of an individual, considering the relevant provision in the context of the Act as a whole, this interpretation is valid.

36. Indeed, looking at the phrasing of subsection (1) to section 194, the condition that "*an adult must have needs for care and support which can be met only if the adult is living in accommodation of a type specified in regulations*" precedes the conjoining requirement that "*the adult is living in accommodation in Wales of a type so specified*", indicating logically that, for the provision to be applicable, a determination whether an adult has such needs that can only be met in a care home ought to be known before the adult is actually living in the specified accommodation. In the context of the Act, this determination as to the individual's needs would clearly involve the relevant 'placing' local authority.

37. X moved, with the capacity to choose where to live, from independent living to the Care Home before an assessment (involving LA2) was made determining that her needs for care and support could be met only by living in specified accommodation and therefore the deeming provision cannot apply.

38. The Explanatory Note to the 2014 Act in respect of section 194 assists by giving an indication of the fundamental purpose of the deeming provision, which is to create a system in which local authorities do not escape financial responsibility by arranging for individuals to be placed outside their own areas. This reflects the interpretation given by the judiciary in relation to similar deeming provisions in the cases of Kent County Council and Cornwall Council. The facts of this case do not demonstrate that LA2 acted to invoke the application of the deeming provisions for the purpose it was intended.

39. Referring to the deeming provision, the term "*arranging*" is used consistently in the Code of Practice along with phrases such as "*where the local authority considers it appropriate*", "*if the local authority which is responsible for meeting their needs for care and support makes arrangements*", "*local authorities will …be required to arrange accommodation …".* The clear emphasis on local authority involvement in the arrangement of specified accommodation reinforces the purpose of the deeming provision to impose financial responsibility where a local authority with statutory responsibility is engaged in the arrangement of the out-of-area placement.

40. The Code of Practice expressly envisages a situation in which the deeming provision is disapplied where an individual exercises a choice to live beyond a local authority boundary outside of the provisions of a care and support plan. The Code of Practice is also clear that the deeming provision is disapplied in the similar scenario where a person arranges and self-pays for a cross-border placement.

41. X did not have a care plan for care and support with LA2. She was not placed at the Care Home by the authority nor was LA2 involved in arranging her placement. By making the decision to move to the Care Home independently of LA2, (using Lord Scarman's words for the Shah test) she adopted the Care Home voluntarily and for settled purpose and became ordinarily resident in the area of LA1.

42. The determination of the Welsh Ministers dated 9 February 2021 is of limited application to X's situation. The determination was based on a set of distinguishable facts to those that apply in this case. Significantly, unlike the case considered in the determination of the 9 February 2021, X has the requisite capacity to decide where to live and the Shah test applies without adaptation, and LA2 has not acted to an extent that would engage the deeming provision i.e. prior to X's decision to move to the Care Home, there was no assessment of needs for care and support and no care and support care plan established; there was no contractual arrangement involving LA2 and the Care Home and LA2 has not undertaken any reviews or monitoring of care in relation to X at the Care Home.

Determination

43. For the reasons set out above, the Welsh Ministers have determined that:
    a. the deeming provision under section 194 of the 2014 Act does not apply;
    b. upon deciding to move to the Care Home upon discharge from hospital on 26 January 2023, X became ordinarily resident in the area of LA1;
    c. responsibility for the funding of her care upon reaching the eligibility threshold rests with LA1 under section 35 of the 2014 Act.

Dated: 3 April 2025

Signed by:

On behalf of the Welsh Ministers.